COURT OF APPEAL FOR ONTARIO

CITATION: Good v. Toronto (Police Services Board), 2016 ONCA 250
DATE: 20160406
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Hoy A.C.J.O., Pardu and Roberts JJ.A.

BETWEEN

Sherry Good

Plaintiff (Respondent)

and

Toronto Police Services Board, Attorney General of Canada, Her Majesty the Queen in Right of Ontario and Regional Municipality of Peel Services Board

Defendant (Appellant)

Kevin McGivney, Cheryl M. Woodin and Damian Hornich, for the appellant

Eric K. Gillespie, Kent Elson, Kiel Ardal and Priya Vittal, for the respondent

David Morritt and Alexis Beale, for the intervener, Canadian Civil Liberties Association

Heard: February 1, 2016

On appeal from the orders of the Divisional Court (Justices David Aston, Ian V.B. Nordheimer and Maria T. Linhares de Sousa), dated August 6 and October 29, 2014, with reasons reported at 2014 ONSC 4583 and 2014 ONSC 6115, allowing an appeal from the order of Justice Carolyn J. Horkins of the Superior Court of Justice, dated May 23, 2013, with reasons reported at 2013 ONSC 3026 and 201 ONSC 5086.

Hoy A.C.J.O.:

1. OVERVIEW

[1] During the G20 summit held in June 2010, demonstrations occurred at various locations in the City of Toronto. Police encircled or "boxed-in" groups at multiple locations. At three of the locations, the individuals detained were arrested and taken to a central Detention Centre specially constructed for the G20 event. The conditions at the Detention Centre were poor. Significant delays, overcrowding, and a breakdown in prisoner care occurred.[1] In total, approximately 1,000 people were arrested or detained.

[2] The plaintiff, Sherry Good, was among them. She commenced a proposed class action against Toronto Police Services Board ("TPS") and three other defendants asserting multiple claims, including breach of her *Charter* rights and those of the putative class members.

[3] The motion judge dismissed the plaintiff's motion for certification of the proposed class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "Act"). Before appealing to the Divisional Court, the plaintiff narrowed her proposed class proceeding.

[4] The Divisional Court set aside the order of the motion judge and certified the narrowed claim as two separate class proceedings.

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[1] See Hon. John W. Morden, Independent Civilian Review into Matters Relating to the G20 Summit (Toronto: 29 June 2012), at p. 33.

[5] The Divisional Court also awarded costs of the original certification motion in the all-inclusive amount of $125,728.03 in favour of the plaintiff. The costs awarded were significantly reduced from those sought by the plaintiff "to reflect the time that was spent on the unsuccessful aspects of the claim as originally advanced."

[6] TPS appeals from the order of the Divisional Court certifying the two proceedings and asks this court to restore the order of the motion judge. The plaintiff seeks leave to cross-appeal the costs awarded by Divisional Court.

[7] Below, for reference, I first set out the test that must be met before the court will certify a class proceeding. Next, I provide an overview of the certification decisions of the motion judge and the Divisional Court. Then I set out the issues on the certification appeal and proceed to my analysis of those issues. Finally, I address the plaintiff's cross-appeal of the costs awarded by the Divisional Court.

2. THE TEST FOR CERTIFICATION

[8] Section 5(1) of the Act sets out the test that must be met before the court will certify a class proceeding:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
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> > (a) the pleadings or the notice of application discloses a cause of action;

> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
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> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

3. THE MOTION JUDGE'S CERTIFICATION DECISION

3.1. The class proceeding as framed before the motion judge

[9] Before the motion judge, the proposed defendants included the Attorney General of Canada ("Canada"), Her Majesty the Queen in Right of Ontario ("Ontario"), and Regional Municipality of Peel Police Services Board ("Peel"). The plaintiff pleaded multiple causes of action: false imprisonment, assault and battery, conversion and trespass to chattels, abuse of public office, systemic

negligence, breach of the *Canadian Charter of Rights and Freedoms* and discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19.

[10] The plaintiff proposed a class definition with eight subclasses: one for each of five locations where police "boxed in" and detained individuals; one for individuals detained or arrested in the vicinity of Queen's Park; a "residual" subclass for individuals who were arrested in relation to the G20 Summit at other locations and eventually released without charge; and one for individuals imprisoned at the Detention Centre. The class and subclasses as proposed to the motion judge are set out in Schedule "A".

[11] Not every cause of action was pleaded with respect to every subclass.

3.2. Section 5(1)(a): Cause of action

[12] In thorough and careful reasons, the motion judge applied the five-part test for certification in s. 5(1) of the Act. She concluded that none of the claims against Canada, Ontario or Peel satisfied the s. 5(1)(a) requirement that the pleadings disclose a cause of action. However, she found that it was not plain and obvious that the following claims against TPS would fail, and that they therefore met the first prong of the s. 5(1) test: false imprisonment; battery (except in relation to individuals detained at the Detention Centre); assault in respect of two of the five location-based subclasses; conversion and trespass to chattels; and the *Charter* and human rights claims.

3.3. Section 5(1)(b): Identifiable class

[13] The motion judge found that the plaintiff had not met the s. 5(1)(b) requirement of an identifiable class. At para. 153, she characterized the plaintiff as seeking to certify, as one class, eight distinct groups of claims with no common link. That, she held, was contrary to s. 5(2) of the Act and to applicable case law – in particular, *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, 69 C.P.C. (6th) 60, leave to appeal to S.C.C. refused, 2009 CanLII 57570; and *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.), at para. 45. In her view, the only proposed common issue that applied to all of the class was the systemic negligence claim which she had struck.

[14] In addition to what she described as this "fatal flaw", she noted that various unclear words and phrases were used in defining the subclasses, which in her view would impair the ability to identify persons with a potential claim, define who would be bound by the result, and describe who was entitled to notice of the proceeding. She identified the phrase "in the vicinity of Queen's Park", the definition of the residual subclass, and the phrase "mass detention" in the various subclass definitions as unclear.

[15] Finally, she concluded that the class and subclass definitions were overly broad. While the proposed class definition and most of the subclasses excluded persons who were charged during the G20 summit, not all persons who engaged in unlawful conduct were necessarily charged. The definitions could include

individuals who engaged in unlawful conduct and were lawfully detained and arrested.

[16] The motion judge concluded that because the plaintiff failed to satisfy s. 5(1)(b), the certification motion failed. However, she went on to consider the requirements of s. 5(1)(c), (d) and (e).

3.4. Section 5(1)(c): Common issues

[17] Section 5(1)(c) requires that "the claims or defences of the class members raise common issues". By the end of the certification hearing, there were 22 proposed common issues before the motion judge. They are set out in Schedule "B".

[18] The motion judge addressed the common issues only as they related to TPS, since she had found that the pleadings did not disclose a cause of action against Ontario, Canada or Peel. She also restricted her analysis to the common issues arising from the surviving claims against TPS. The common issues were further narrowed before the Divisional Court and, in turn, I will only highlight her conclusions on these latter common issues.

[19] The first of those issues was whether "each mass detention and/or arrest (or the prolonged duration thereof)" constituted false imprisonment and/or arbitrary detention or imprisonment contrary to s. 9 of the *Charter*.

[20] The motion judge held that this was not a common issue. At para. 205, she found that individual officers were responsible for deciding whether detention, arrest and a charge were appropriate. At para. 206, she rejected the plaintiff's argument that because a command was made to arrest a group, the lawfulness of that arrest could be decided in common. She focused on what she found was evidence that individual conduct among protesters at the G20 Summit varied.

[21] The second set of remaining common issues related to the conditions or treatment of the class members imprisoned at the Detention Centre. At para. 245, the motion judge concluded that these proposed common issues were indeed common issues and noted that TPS did not dispute this.

[22] The third set of common issues related to remedies:

> If the Defendants breached the class members' common law or *Charter* rights, can the Court make an aggregate assessment of damages as part of the common issues trial?
>
> Were the Defendants guilty of conduct that justifies an award of punitive damages?
>
> Are declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit warranted?
>
> Are orders requiring the Defendants to expunge certain records warranted?

[23] The motion judge wrote, at para. 247, that, "rather than proposing an issue to be determined at trial, [the first of these issues] asks whether the proposed common issue can be determined at the common issues trial." She concluded that aggregate damages were inappropriate in this case. She wrote, at para. 250:

> It is clear from the evidence and even from the pleading that the experience of the proposed class members varied. This is not a case where monetary liability could be ascertained on a global basis. One obvious example is the contrast between those detained in the detention center and those who were not. Another example is the experience of Jessica Cole at Queen's Park. Her arm was broken. This is obviously not an experience shared by all in this subclass.[2]

[24] Because she had determined that the certification motion would fail for other reasons, the motion judge did not go on to consider the other remedy-related proposed common issues, including punitive damages.

3.5. Section 5(1)(d): Preferable procedure

[25] The motion judge then considered the requirement in s. 5(1)(d) that the class proceeding be the preferable procedure for the resolution of the common issues. She concluded, at para. 255:

> It is clear given the lack of commonality that a class action would not be a fair, efficient and manageable method of advancing the claim. The impermissible use of eight subclasses creates an unwieldy group of claims. There is no single class that shares "substantial

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[2] By the time of the Divisional Court appeal, the Queen's Park subclass was no longer part of the proposed action.

> common issues" (*Caputo,* at para. 45.) The common issues are subsumed by a plethora of individual issues. The result would be unmanageable litigation punctuated by numerous individual inquiries, and full trials for each class member. Instead of furthering the goal of judicial economy, a class proceeding would impede this important goal.

[26] She also noted that in this case behaviour modification did not depend on a class action. The conduct of police officers during the G20 summit had been and was continuing to be reviewed by various bodies and committees. Moreover, individual actions were being pursued in respect of events arising out of the G20 summit.

3.6. Section 5(1)(e): Representative plaintiff and a workable litigation plan

[27] Finally, the motion judge considered the requirement of s. 5(1)(e). She noted the plaintiff's proposal to add a second representative plaintiff, Thomas Taylor, who had been detained at the Detention Centre to address the fact that the plaintiff had not. She concluded that the litigation plan did not set out a workable plan for advancing the proceeding on behalf of the class.

3.7. Disposition

[28] The motion judge dismissed the certification motion.

4. THE DIVISIONAL COURT'S CERTIFICATION DECISION

4.1. The class proceeding as framed before the Divisional Court

[29] As noted above, before appealing to the Divisional Court, the plaintiff narrowed her proposed class proceeding. She shrunk the proposed class, dropped her claim against all defendants except TPS, and abandoned a number of the claims asserted before the motion judge. The Divisional Court prefaced its analysis by noting that the proposed class action on appeal was markedly different from the proposed class action considered by the motion judge.

4.2. Section 5(1)(a): Cause of action

[30] The Divisional Court noted that it was not disputed that the s. 5(1)(a) cause of action requirement was met. The plaintiff had dropped the causes of action that the motion judge had found were not made out.

4.3. Section 5(1)(b): Identifiable class

[31] At the Divisional Court, the plaintiff eliminated two of the subclasses. Significantly, one of these subclasses was the "residual" subclass, consisting of persons arrested at locations other than those where mass detentions were alleged to have occurred and eventually released without charge. The motion judge had found the definitions of both of the eliminated subclasses to be unclear. The revised proposed class definitions are set out in Schedule C. The

Divisional Court was satisfied that the identifiable class criterion was met by these definitions.

[32] The Divisional Court disagreed with the motion judge that the phrase "mass detention" in the class definitions was confusing.

[33] It also disagreed that the class definitions were overly broad because they might include individuals whose conduct warranted arrest.

[34] Finally, it concluded that the motion judge erred in concluding that it was impermissible to certify a proceeding with multiple location-based subclasses. Section 5(2) of the Act, referred to by the motion judge, did not prohibit multiple subclasses within a class. This case, it held, was different from *Caputo,* which the motion judge had relied on in her analysis. In *Caputo*, the proposed classes lacked "the essential element of commonality". Moreover, *Caputo* did not suggest that a representative plaintiff cannot combine classes in a single proceeding. The Divisional Court wrote, at paras. 35, 36 and 38:

> In this case, there is a single defendant and a single course of conduct alleged. Each of the proposed subclasses (save for the Detention Centre subclass) have the commonality of an alleged command order being made ordering the detention of the class members without regard for the individual characteristics or conduct of each class member. Indeed, it is alleged that one command officer, Superintendent Fenton, issued the command order in at least three of the five location based subclasses.

> Further, allowing multiple subclasses to be joined in the same class proceeding, where they share a central common issue, facilitates two of the recognized goals of class proceedings: judicial economy and improving access to justice. As McLachlin C.J.C. said in *Hollick*, at para. 15:
>
> > In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
> >
> > ...
>
> [E]ven if the respondent was correct in its interpretation of the effect of *Caputo*, all that would result would be the creation of five separate class actions – one for each subclass – each with the same single defendant. If that were to be the result, there would be strong reasons for those five separate class actions to be tried together including for reasons of judicial economy, similarity of issues, common evidence and others. The end result, in practical terms, would be the same.

4.4. Section 5(1)(c): Common issues

[35] Eleven common issues were proposed at the Divisional Court. These are set out in Schedule "D".

[36] Unlike the motion judge, the Divisional Court concluded that the first of these – whether there was false imprisonment or a breach of s. 9 of the *Charter* – was a common issue. It explained, at paras. 46-7 and 49, that *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, requires that the officer who gives the order to detain a person have reasonable cause to suspect that such person is criminally implicated in a recent or ongoing criminal offence. The test is even higher for an

arrest. Both tests share a subjective and an objective element. The Divisional Court observed that, in this case, it is alleged that the command order was given without regard to whether any particular individual swept up in the mass detention was or was not implicated in the criminal activity with which the police were concerned, i.e. that the requirements for a lawful detention were unmet: paras. 47-48.

[37] In the Divisional Court's view, the motion judge impermissibly assessed the merits of the claims rather than considering whether there was some basis in fact for the proposition that the members of the class were arbitrarily detained and/or arrested in violation of their rights at common law or under s. 9 of the *Charter*. It concluded that there was some basis in fact for this proposition and amended the issue to include the question – proposed as common issue 7 – of whether s. 1 of the *Charter* could have application.

[38] The Divisional Court found that there was no basis in fact to find that proposed common issue 2 was a proper common issue.

[39] The Divisional Court concluded that proposed common issues 3 to 6, which arise out of the treatment of class members at and conditions in the Detention Centre, were proper common issues.

[40] The Divisional Court came to a different conclusion from the motion judge on the suitability of aggregate damages as a common issue. While it agreed with

the motion judge that "some limited individual examination" might be necessary before a final award of damages could be made, this would not preclude an aggregate assessment of some level of damages for the class members. Relying on para. 134 of *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57, [2013] 3 S.C.R. 477, it concluded that it should be open to a common issues trial judge to consider whether aggregate damages would be an appropriate remedy. It therefore found that proposed common issue 8 was a proper common issue.

[41] The Divisional Court rejected TPS's argument that *Robinson v. Medtronic, Inc.* (2009), 80 C.P.C. (6th) 87 (Ont. S.C.J.), affirmed 2010 ONSC 3777 (Div. Ct.), stands for the proposition that punitive damages cannot be included as a common issue unless it will be known at the conclusion of the common issues trial what level of compensatory damages will be awarded. It stated, at para. 79, that if *Robinson* stood for that proposition, it disagreed with it. It concluded, at paras. 82-83, that the common issues trial judge would be in a position to make an informed decision on the appropriateness of an award of punitive damages and, accordingly, that whether TPS was guilty of conduct that justifies an award of punitive damages – proposed common issue 9 – was a proper common issue.

[42] The Divisional Court was also satisfied that proposed common issues 10 (whether declaratory relief is warranted) and 11 (whether orders requiring TPS to expunge certain records are warranted) were proper common issues.

4.5. Section 5(1)(d): Preferable procedure

[43] The Divisional Court concluded that a class proceeding was the preferable procedure for the location-based subclasses. It described common issue 1 (false arrest/breach of s. 9) as the "core allegation" of these subclasses. It noted that the plaintiff alleged that a single command was made with respect to the mass arrest and/or detention at each of the locations. There was obvious judicial economy in determining once, for all members of the subclasses, on what basis the order to detain and/or arrest was made and how that order was communicated.

[44] It also concluded that the case raised a very serious access to justice issue. Most of the affected individuals would be unwilling to devote the time and expense necessary to seek individual relief. The fact that only a small number of individual cases had been commenced supported this conclusion.

[45] In its view, the various investigations undertaken of the policing at the G20 summit did not achieve the goal of behaviour modification. It concluded, at para. 95, that an award of damages could "be the most telling and lasting expression that [the police conduct alleged] should never be tolerated."

[46] While the Divisional Court concluded that a class action was also the preferable way of determining the issues raised by the Detention Centre, it noted, at para. 99:

> The issues raised by the Detention Centre subclass are not similar to the issues raised by the location based subclasses nor do they involve similar evidence nor do they apparently involve even the same decision makers. Indeed, the only common theme between the two is the fact that the claims emanate out the G20 summit and the conduct of the police for whom [TPS] is responsible.

[47] Accordingly, it concluded that there should be a separate class action to determine the issues raised by the Detention Centre.

4.6. Section 5(1)(e): Representative plaintiff and workable litigation plan

[48] The Divisional Court concluded that there was no legitimate complaint regarding the ability of the plaintiff to represent the location-based subclasses and the ability of Mr. Taylor to represent the Detention Centre class. It noted that while the litigation plan might have to be reworked given its conclusion that two separate class actions should be certified, it was otherwise adequate. TPS's criticisms of the litigation plan mirrored its criticisms of the common issues and had already been addressed.

4.7. Disposition

[49] The Divisional Court certified two class actions, one to determine the common issues for the location-based subclasses and one to determine the issues arising out of the Detention Centre. The certified common issues for each are set out in Schedule "E". The plaintiff is the representative plaintiff for the former; Mr. Taylor is the representative plaintiff for the latter.

5. THE ISSUES ON TPS' APPEAL OF CERTIFICATION

[50] TPS argues that in certifying the action the Divisional Court made the following errors:

1) It improperly conducted a *de novo* review of the issue of whether the requirements of s. 5(1) of the Act had been met, rather than applying an appellate standard of review to the motion judge's determination that they had not.

2) It erred in concluding that the plaintiff had met the s. 5(1)(b) identifiable class criterion.

3) It erred in identifying the following as common issues, when they are not:

    i. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members at common law and/or (b) arbitrary detention or imprisonment contrary to s. 9 of the *Charter*, including a determination of whether the mass detentions and/or arrests are justified under s. 1;

    ii. If TPS breached the class members' common law or *Charter* rights, can the court make an aggregate assessment of damages as part of the common issues trial?

    iii. Was TPS guilty of conduct that justifies an award of punitive damages?

4) It erred in concluding that a class proceeding would be the preferable procedure for the resolution of the common issues.

5) It certified two class proceedings in the absence of discrete Statements of Claim for either.

6. ANALYSIS: TPS' APPEAL OF CERTIFICATION

6.1. Did the Divisional Court improperly conduct a *de novo* review of the issue of whether the requirements of s. 5(1) of the Act had been met, rather than applying an appellate standard of review to the motion judge's determination that they had not?

[51] TPS correctly submits that a motion judge's certification decision is entitled to substantial deference: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33. And TPS acknowledges that where, as here, a plaintiff narrows its proposed action on appeal, the reviewing court must be accorded some latitude. However, TPS argues that the Divisional Court went too far and reversed determinations made by the motion judge which were unaffected by the narrowing of the scope of the proposed class proceeding and fell within the motion judge's discretion.

[52] I do not agree that the Divisional Court's intervention was impermissible. The determinations made by the motion judge were made in the context of the class action as then proposed. The proposed class action on appeal was significantly narrower than the proposed class action considered by the motion judge.

[53] Before the motion judge, the class included all individuals who were arrested and/or subjected to mass detention by police on June 26 and 27, 2010 in relation to the G20 summit, and released without charge or imprisoned at the

Detention Centre. It was not restricted to subclasses of individuals subject to mass detention at specified locations, as it was before the Divisional Court.

[54] Where the Divisional Court reversed determinations made by the motion judge, it was justified in doing so because of the narrowed scope of the proposed class proceeding. As I will identify in the context of the specific issues raised on appeal with respect to the s. 5(1) criteria, the motion judge made errors in principle which, while of no significance on the certification motion as framed before her, became significant in the context of the proposed class action as framed on appeal. In these circumstances, deference was necessarily displaced.

6.2. Did the Divisional Court err in concluding that the plaintiff had met the s. 5(1)(b) identifiable class criterion?

6.2.1. TPS' arguments on appeal

[55] TPS argues that: (i) the motion judge did not err in principle in concluding that the plaintiff impermissibly sought to certify distinct subclasses with no common link; (ii) the motion judge correctly found that the class and subclass definitions were overly broad; and (iii) the Divisional Court identified no reviewable error in the motion judge's conclusion that the proposed class definition included unclear words and phrases, and simply substituted its own opinion for that of the motion judge.

[56] I would not give effect to any of these arguments.

6.2.2. Distinct subclasses

[57] Having regard to the breadth of the proposed class before the motion judge, I agree with TPS that the motion judge did not err in principle in concluding that the plaintiff impermissibly sought to certify distinct subclasses with no common link. However, I also agree with the Divisional Court that the identifiable class criterion was met on appeal.

[58] On appeal, the class was restricted to subclasses of individuals subject to mass detention at specified locations.

[59] The plaintiff alleges that Superintendent Fenton was the command officer who issued the order in at least three of the five location-based subclasses, and that either he or one other officer made the order in the other two instances. Having regard to the applicable tests for lawful arrests and detentions that the Divisional Court adverted to, there was some basis in fact for finding that the individual officer or officers who are alleged to have given orders for mass detentions and arrests did so without regard to whether all of the individuals detained, or detained and then arrested, were implicated in the criminal activity with which the police were concerned.

[60] The Divisional Court correctly found "the commonality of an alleged command order being made ordering the detention of the class members without

regard for the individual characteristics or conduct of each class member" (at para. 35).

[61] The existence of this central commonality linking the subclasses distinguishes this case from *Merck* and *Caputo*, which the motion judge relied on.

[62] I agree with the Divisional Court that the combination of classes in a single proceeding is not prohibited.

[63] While s. 5.1(b) of the Act requires that "there is an identifiable class of two or more persons", it does not prohibit the certification of an action as a class proceeding where there is more than one class. In my view, it would be overly restrictive to interpret the Act as containing such a prohibition. I agree with the Divisional Court that where, as here, the proposed classes share a central commonality, joining multiple classes in the same class proceeding would facilitate recognized goals of class proceedings, and the other requirements of s. 5.1 would be satisfied, a motion judge, in her discretion, may do so.

[64] In these circumstances, it was open to the Divisional Court to determine that it was appropriate to join the location-based subclasses in the same class proceeding. It might be argued that what the Divisional Court characterizes as location-based subclasses are properly described as distinct classes within a single class proceeding, and not subclasses. However, in the circumstances, this distinction is without substance.

[65] I note that TPS does not argue that the plaintiff would not fairly and adequately represent the interests of all of the location-based subclasses or that the protection of the interests of the members of such subclasses requires that they be separately represented. The record includes an affidavit from a member of each of the location-based classes: it appears it would not be difficult to create separate representation. Should the circumstances change, such that separate representation is required, the court may amend the certification order pursuant to s. 10(1) of the Act on the motion of a party or class member.

6.2.3. Overly broad class definition

[66] I reject TPS' argument that the motion judge correctly concluded that the location-based subclass definitions should exclude individuals who engaged in unlawful conduct during the protests. Her conclusion was made in the context of a proposed class that included more than location-based subclasses. In the context of a class restricted to location-based subclasses, and some basis in fact that there was a single command order for group detentions and arrests at each location, focusing on evidence of varying individual conduct among the protesters unrelated to the single command order becomes an error in principle. I agree with the Divisional Court which wrote, at para. 29, that "it is of no consequence whether any member of the class did, in fact, commit a criminal offence or a breach of the peace. The police cannot justify the detention of a person based on

information that they either did not have, or which they did not rely upon, in ordering a person to be detained."

6.2.4. Unclear words and phrases

[67] After finding that there was a "fatal flaw" in the proposed class definition, the motion judge carefully catalogued what she considered to be other deficiencies in the proposed class definition, including that some words and phrases in the class definition were unclear.

[68] Her concern was largely with respect to the definition of the subclass of individuals detained or arrested in the vicinity of Queen's Park and the "residual" subclass. The plaintiff addressed this concern by eliminating the Queen's Park and residual subclasses before appealing to the Divisional Court.

[69] Therefore, all that remained on appeal was the motion judge's concern with respect to the meaning of "mass detention", as used in the definitions of the other location-based subclasses. In each of the remaining subclass definitions, "mass detention" is qualified by "in a police cordon". I agree with the Divisional Court that "mass detention" as used in these remaining definitions is not unclear. I have no doubt that if the only deficiency that the motion judge had perceived were the use of the words "mass detention" in these remaining definitions, she, like the Divisional Court, would have concluded that the s. 5(1)(b) criterion had been satisfied.

6.3. Did the Divisional Court err in finding that three issues that the motion judge had not found were common issues are in fact common issues?

6.3.1. False imprisonment/breach of s. 9

[70] I reject TPS's argument that the Divisional Court erred in finding that this is a common issue. As I have indicated above, I agree with the Divisional Court's analysis. The motion judge's conclusion that this issue was not a common issue was rooted in her focus on the possibility of varying individual conduct by the individuals who were arrested or detained which is an error in principle in the context of the class as cast on appeal.

[71] Further, I agree with the Divisional Court that to the extent that the motion judge concluded that street-level officers had discretion in arresting or detaining protesters (and it is not clear to me that she so concluded), she impermissibly strayed into an assessment of the merits.

6.3.2. Aggregate assessment of damages

[72] Section 24(1) of the Act sets out when the court may award aggregate damages:

> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of

> monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[73] As noted above, the motion judge concluded that monetary liability could not be determined at trial on a global basis. The Divisional Court concluded that this determination should be left to the common issues judge.

[74] I agree with the Divisional Court that it should be open to the common issues judge to consider whether aggregate damages would be an appropriate remedy, in whole or in part. The motion judge's decision pre-dated the Supreme Court's decision in *Pro-Sys.* At para. 134, Rothstein J. wrote this for the court, in relation to legislation in British Columbia that parallels the Act:

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. *The ultimate decision as to whether the aggregate damages provisions of the CPA should be available is one that should be left to the common issues trial judge.* [Emphasis added.]

[75] Further, this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, s. 24(1) asks whether the aggregate or a part of the defendant's liability can

reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the *Charter*, a minimum award of damages in a certain amount is justified."

6.3.3. Punitive damages

[76] The motion judge did not consider whether the proposed punitive damages issue was a proper common issue. It is undisputed that whether a defendant's conduct merits an award of punitive damages can be certified as a common issue. Thus, the question is whether the Divisional Court erred in its conclusion that, in this case, it is a proper common issue.

[77] Relying on *Robinson*, TPS argues that the Divisional Court so erred. I reject this argument. As the Divisional Court explained, *Robinson* is very different from this case.

[78] In *Robinson*, Perell J. considered the law of punitive damages, as set out in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. From that analysis, he concluded as follows, at para. 171:

> In order to rationally determine whether punitive damages should be awarded and to determine the quantum of them, the court needs to know the quantum of compensation that will be awarded.

[79] In *Robinson*, the common issues trial would not determine the defendant's ultimate liability. Causation and injury to the class members were individual issues. Perell J. concluded that entitlement to and quantum of punitive damages were not a proper common issue.

[80] Here, unlike in *Robinson*, the common issues dealing with alleged breaches of the class members' rights contemplate that liability will be determined at the common issues trial. And the common issue proposed, and certified, is only whether TPS' conduct justifies an award of punitive damages. The plaintiff did not propose as a common issue whether an award of punitive damages should be made against TPS and, if so, in what amount.

[81] In *Pro-Sys,* at para. 134, Rothstein J. makes clear that the failure to certify aggregate damages as a common issue does not preclude the trial judge from invoking s. 24(1) of the Act if considered appropriate once liability is found. In my view, it would also be open to the trial judge to consider whether, having regard to *Whiten*, an award of punitive damages should be made against TPS and, if so, in what amount, even though this issue has not been certified. The aggregate assessment of damages common issue contemplates that the common issues trial judge could determine at least part of the monetary relief owed to class

members on an aggregate basis. While the Divisional Court conceded, at para. 72, that "some limited individual examination may be necessary before a final award of damages could be made", it concluded, at para. 82:

> In this case, the common issues trial judge will be armed with all of the necessary information, including a general understanding of the likely level of compensatory damages, to make an informed decision on the appropriateness of an award of punitive damages.

[82] In my view, if liability were found, and at least part of the compensatory damages were assessed on an aggregate basis, it would be open to the trial judge to consider whether she had a sufficient measure of the compensatory damages to determine entitlement to and the quantum of punitive damages, consistent with the principles in *Whiten*, or whether this could be determined only after any individual assessment phase.

6.4. Preferable procedure

[83] TPS argues that the Divisional Court erred by considering the preferable procedure requirement in s. 5(1)(d) *de novo* and not affording deference to the motion judge's determination that a class proceeding was not the preferable procedure. It says that the Divisional Court did not explain how the fact that the plaintiff narrowed her action justified it in doing so or what errors the motion judge made in her preferability analysis.

[84] I reject this argument. In the circumstances, the Divisional Court was entitled to consider the requirement in s. 5(1)(d) *de novo*. "Lack of commonality" was fundamental to the motion judge's determination that a class proceeding would not be the preferable procedure for the resolution of the common issues (at para. 255). The Divisional Court correctly concluded both that the plaintiff had satisfied the identifiable class criterion in s. 5(1)(b) and that the core allegation in the action was indeed a common issue. These conclusions radically altered the landscape in which the preferability analysis was conducted.

[85] I agree with the Divisional Court that a class proceeding is the preferable procedure for the resolution of the common issues and with its reasons for so concluding.

[86] On appeal, and without objection by the plaintiff, TPS provided an update on the number of individual claims that have arisen out of the G20 summit. More than five years after the events at issue occurred, only 16 members of the class have brought individual claims, and 15 of those have been "resolved". It remains apparent that most of the affected individuals are unwilling to devote the time and expense necessary to seek individual relief. The access to justice issue identified by the Divisional Court continues to be an important one.

[87] The reports regarding police conduct during the G20 summit make non-binding recommendations.[3] In my view, the remedies sought by the plaintiffs, which include a declaration that class members' *Charter* rights have been violated and an award of damages, would be stronger instruments of behaviour modification.

6.5. Absence of discrete statements of claim for two proceedings

[88] TPS argues that the Divisional Court's certification of the plaintiff's claim as two separate proceedings in the absence of discrete statements of claim was procedurally unfair because it deprived TPS of the ability to make submissions on the certification test with reference to a pleading. It submits that the Divisional Court's approach was contrary to both *Brown v. Canada (Attorney General)*, 2013 ONCA 18, 114 O.R. (3d) 355 and *Turner v. York University*, 2011 ONSC 3169 (Div. Ct.) at paras. 4-5.

[89] I reject this argument. In another class action matter, this court recently affirmed that "there must be some latitude on appeal for consideration of issues not raised at first instance provided that the other party is afforded procedural fairness": *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d)

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[3] The reports in the record were the Independent Civilian Review into Matters Relating to the G20 Summit (Toronto: 29 June 2012) authored by the Honourable John W. Morden, and the Toronto Police Service After-Action Review (Toronto: Toronto Police Service, June 2011).

447, at para. 24. I am not persuaded that there was any procedural unfairness to TPS. This case is very different from *Brown* and *Turner*.

[90] The possibility of converting the single proposed class action into more than one class action was suggested as an alternative in the plaintiff's factum before the Divisional Court. TPS was not taken by surprise; it had the ability to respond to this suggested alternative. In these circumstances, TPS' ability to make submissions on the certification test was unaffected by the absence of separate pleadings.

[91] In *Brown*, in contrast, the motion judge conditionally certified the class proceeding in the absence of a statement of claim disclosing a cause of action. As Rosenberg J.A. wrote, at para. 44:

> [I]dentification of a cause of action is fundamental. It is impossible for the defendant to meaningfully respond to an application for certification without knowing the cause of action.

[92] Similarly, in *Turner*, the plaintiff sought to appeal the certification decision of the motion judge on the basis of a new, proposed Amended Statement of Claim that "significantly change[d] the underpinning of the class action". The Divisional Court held that it was not the proper forum for a decision of first instance on certification and a fresh motion for certification in the court below was

required. It accordingly stayed the appeal and directed the plaintiff to bring any motion to amend the Statement of Claim in the court below.[4]

[93] I endorse the approach adopted by the Divisional Court in *Turner*. However, in this case, as I have said, there was no procedural unfairness to TPS.

7. THE PLAINTIFF'S CROSS-APPEAL ON COSTS

7.1. Overview

[94] Before the Divisional Court, the plaintiff sought costs of the original certification motion in the amount of $749,267.03, including disbursements, but excluding HST. In response, TPS submitted that because the plaintiff significantly reformulated her claim on the appeal, TPS should receive $20,000 in costs thrown away or, alternatively, there should be no costs on the certification motion.

[95] The Divisional Court rejected TPS' argument but awarded costs in favour of the plaintiff in the significantly reduced amount of $125,728.03, inclusive of disbursements and HST.

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[4] The plaintiff's motion for leave to amend his Statement of Claim was subsequently denied: 2011 ONSC 6151. He then proceeded with his appeal of the motion judge's denial of certification on the basis of the original record before the motion judge. The Divisional Court dismissed the appeal: 2012 ONSC 4272, 40 C.P.C. (7th) 156.

[96] I would grant leave to the plaintiff to cross-appeal the Divisional Court's cost award, allow the cross-appeal and award the plaintiff costs of the certification motion in the all-inclusive amount of $315,000.

[97] Below, I first briefly outline the Divisional Court's costs reasons. Then I explain my conclusion that the Divisional Court erred in principle in arriving at its costs disposition.

7.2. The Divisional Court's costs reasons

[98] In rejecting TPS' argument that the plaintiff should be denied costs, the Divisional Court distinguished *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 3690, 374 D.L.R. (4th) 529 (Div. Ct.), where another panel of the Divisional Court denied a plaintiff who was successful on appeal of costs of the certification motion. It reasoned that, unlike in *Keatley*, the plaintiff in this case did not completely re-formulate her case on the appeal. Here, the central claims against TPS remained. And unlike *Keatley*, this class action raised matters of public interest.

[99] The Divisional Court acknowledged that the issues raised were complex. However, it reduced the amount of costs claimed by the plaintiff "to reflect the time that was spent on the unsuccessful aspects of the claim as originally advanced" (at para. 10). At paras. 4 and 5, it wrote:

> The issue of plaintiffs amending their claims as the certification process unfolds is a problematic one, as we

> commented on in our reasons on the appeal. We do not accept the appellant's position that such changes are of no real consequence in the assessment of a proper award of costs. The fact is that, had the claim been put forward originally in the form that it was put forward on the appeal, the decision of the motion judge might have been different. It follows that some amount of time that was spent on the certification motion was wasted because the plaintiff had cast her claim too broadly. There must be costs consequences associated with plaintiffs who overreach in that fashion…
>
> What is fair, in our view, is to recognize that the claim as presented before us was materially different than the claim presented before the certification judge.

[100] The Divisional Court also noted that while TPS submitted a bill of costs on the certification motion in the amount of $637,835.29, it only sought the amount of $393,233.37, and was awarded only $223,233.37 in costs.

7.3. Analysis

[101] I agree with the Divisional Court that a reduction in the costs sought by the plaintiff is warranted to reflect the change in the scope of the plaintiff's claim on appeal. Indeed, the plaintiff acknowledges that some discount is appropriate. However, in my view, the Divisional Court erred in principle in two respects in arriving at its costs disposition.

[102] First, in determining the quantum of the award, the Divisional Court relied on inapplicable benchmarks. Second, it failed to consider the impact of its costs award on access to justice, a fundamental object of the Act and one of the principles and factors that a court must keep in mind in arriving at its costs

disposition: *Ruffolo v. Sun Life Assurance Co. of Canada*, 2009 ONCA 274, 95 O.R. (3d) 709 at para. 37; *Brown*, at para. 58. Either of these errors in principle warrants the intervention of this court.

[103] I address these two points in turn.

[104] As I have noted, in fixing the amount of costs it awarded, the Divisional Court focused on the fact that TPS only sought costs on the certification motion in the amount of $393,233.37, and the fact that it was only awarded $223,233.37 in costs. It was an error in principle to use these amounts as benchmarks.

[105] Section 31(1) of the Act specifically mentions the public interest as a factor to be considered in fixing costs in class proceedings. This court has held that where a factor mentioned in s. 31(1) applies, failure to consider and accord significance to such a factor is an error in law: *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427, at para. 11; *Brown*, at para. 39. TPS in seeking costs, and the motion judge in awarding them, accorded significance to the public interest factor: the costs sought by and awarded to TPS had built-in reductions for the public interest factor in this action. However, in costs awards to representative plaintiffs, the public interest factor operates in the opposite fashion, *increasing* the award to the plaintiff: *Pearson*, at para. 8.

[106] In addition, the motion judge tempered the costs she awarded to TPS to reflect access to justice concerns. Such a reduction is similarly not appropriate when awarding costs of a certification motion to a successful plaintiff.

[107] TPS' actual partial indemnity costs of $637,835.29 for the certification motion – and not the amount it actually sought or the amount awarded to it – is a measure of the costs that TPS could reasonably expect to pay and the reasonableness of the costs sought by the plaintiff in this undisputedly complex action. That amount is an appropriate benchmark.

[108] I turn to the second point.

[109] In *Pearson*, at para. 13, and *Brown*, at para. 58, this court provided a list of nine principles and factors to guide the award of costs on a certification motion. One of those is whether the appellant's claim substantially evolved from the claim brought before the motion judge. Another is that a fundamental objective of the Act is to provide enhanced access to justice.

[110] Respectfully, in my view the Divisional Court erred by reducing the costs it awarded to the plaintiff to reflect the evolution of her claim without considering the effect on the legislative goal to access to justice of doing so. *Ruffolo*, at para. 37, makes clear that in arriving at its costs dispositions, the court must *always* keep in mind the legislative goals of access to justice, behaviour modification and judicial economy. I accept the plaintiff's submission that, left untouched, the

Divisional Court's costs award would have a chilling effect on public interest class actions and would substantially hinder access to justice.

[111] Bearing the principles and factors outlined in *Pearson*, *Brown* and *Ruffolo* in mind, in my view a fair and reasonable award in favour of the plaintiff is the all-inclusive amount of $315,000.

[112] I have discounted the costs that she seeks to reflect that her claim substantially evolved from the claim before the motion judge. The class proceeding as framed before the motion judge was quite different from that before the Divisional Court. This is apparent from the descriptions, at sections 3.1 and 4.1 of these reasons, of the class proceeding as framed before the motion judge and the Divisional Court and from a comparison of Schedules A and B to Schedules C and D of these reasons.

[113] However, as the plaintiff submits, and as the Divisional Court observed, the central claims against TPS remained intact. Also, I have taken into account the plaintiff's submission that two of the three defendants she released on appeal had only been added to the claim because the motion judge held, at an earlier carriage motion, that it would be in the best interests of the class to do so.[5]

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[5] See *McQuade v. Toronto Police Services Board*, 2011 ONSC 5086, at para. 31.

[114] While the discount is less than would otherwise be the case because the action raises a very important issue of public interest, it is nonetheless meaningful. If it were not, it would be unfair to TPS, which was faced with a significantly different claim on appeal. However, I am satisfied that the discount is not such that it will adversely affect the object of the Act of providing enhanced access to justice.

[115] The plaintiff also argued that the Divisional Court erred by failing to consider that the proceeding raised novel points of law. For example, she says, never before had it been alleged that a police organization had a duty of care for its overall planning of large-scale police operations. Moreover, she submits, this is the first group arrest action in common law Canada.

[116] The motion judge rejected the plaintiff's argument that the proceeding raised novel points of law and that accordingly no costs should be awarded against her. The motion judge characterized the proceeding as entailing the application of settled negligence law. Further, she noted that the plaintiff had relied on mass detention/arrest class actions certified in Quebec and Ontario as justification for certification. She wrote, at para. 16, "If this argument is accepted then every class action with a subject matter that has never been 'certified' before would be 'novel'".

[117] As the plaintiff submits, whether a proceeding raises a novel point of law is one of the three factors mentioned in s. 31(1) of the Act and a court must consider and accord significance to it in determining costs. In my view, whether a proceeding is a novel point of law is an important determination when a plaintiff is unsuccessful in a certification motion. It may insulate her from a costs award. However, where, as in this case, the plaintiff is ultimately successful on the certification motion in an undisputedly complex proceeding, the "novel point of law" factor is subsumed in the assessment of the complexity of the issues. In arriving at my costs disposition, I have accepted that this is a complex proceeding.

8. DISPOSITION AND COSTS OF THE APPEAL AND CROSS-APPEAL

[118] I would dismiss the appeal, grant leave to the plaintiff to cross-appeal the costs awarded by the Divisional Court, allow the cross-appeal and award all-inclusive costs on the certification motion in the amount of $315,000 to the plaintiff.

[119] As the plaintiff was successful on the appeal and cross-appeal, I would award her costs of both, on a partial indemnity scale. Accordingly, the Law Foundation of Ontario is not entitled to notice or to make submissions in respect of costs. Bearing the principles and factors outlined in *Pearson*, *Brown* and *Ruffolo* in mind, $65,000 inclusive of disbursements and HST is in my view a fair

and reasonable award. It is the amount of TPS' all-inclusive partial indemnity costs on the appeal and cross-appeal. While less than the $116,789.16 the plaintiff sought, it is a significant award.

Released: APR 0 6 2016

Alexander J.

I agree G. Hoy J.A.

I agree S.B. Roberts J.A.

SCHEDULE "A"

The Proposed Class Definition and Subclasses Before the Motion Judge

Proposed Class

Those individuals in the City of Toronto who were arrested and/or subjected to mass detention by police, on June 26 and 27, 2010, in relation to the G20 Summit, and were:

(a) released without charge; and/or

(b) imprisoned in the Eastern Avenue Detention Centre.

Location Subclasses

Putative class members who were arrested or subjected to mass detention by police as follows:

(1) in a police cordon in the vicinity of the intersection of Queen Street West and Spadina Avenue on the afternoon of June 27, 2010, and eventually released without charge (the "Queen and Spadina Subclass");

(2) in a police cordon in the vicinity of the Hotel Novotel Toronto Centre on the Esplanade on the evening of June 26, 2010, and eventually released without charge (the "Esplanade Subclass");

(3) in a police cordon in the vicinity of the Eastern Avenue Detention Centre on the morning of June 27, 2010, and eventually released without charge (the "Eastern Avenue Subclass");

(4) in a police cordon in the vicinity of the intersection of Queen Street West and Noble Street on June 27, 2010, and eventually released without charge (the "Parkdale Subclass");

(5) during mass arrests in the vicinity of Queen's Park on the afternoon of June 26, 2010, and released without charge or charged with unlawful assembly and/or any other offence related to a failure to disperse from the vicinity of Queen's Park; (the "Queen's Park Subclass");

(6) at the University of Toronto Graduate Students' Union Gymnasium on the morning of June 27, 2010 (the "Gymnasium Subclass"); and

Residual Subclass

Individuals who were arrested in relation to the G20 Summit at locations in Toronto (other than those listed above) for whom the defendants have records relating to the arrest and who were eventually released without charge.

Detention Centre Subclass

An "overlapping subclass" consisting of all putative class members who were arrested and imprisoned in the Eastern Avenue Detention Centre beginning on June 26 or 27, 2010 (the "Detention Centre Subclass").

SCHEDULE "B"

The Proposed Common Issues Before the Motion Judge

Systemic Wrongdoing

1.1 In their planning, operation, or management of G20 Summit security, did the Defendants owe a duty of care to the class members?

Re Residual Subclass

1.2 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service order or authorize officers to arrest individuals on grounds such as the failure to submit to a search or the possession of a bandana or other protest-related items?

1.3 Did commanding, supervising, or senior officers under the authority of the Toronto Police Service in the early evening of Saturday, June 26, 2010, order or authorize officers to arrest any demonstrators remaining on the streets?

1.4 Did the Defendants fail to ensure that officers received balanced and adequate training regarding the protection of *Charter* rights?

Re Location-Based Subclasses and Residual Subclass

1.5 Did commanding, supervising, or senior officers under the authority of the Defendants adopt or permit a strategy to "take back the streets" after the vandalism on Saturday through a general round up of peaceful demonstrators (including by the use of mass detentions/arrests as a method of crowd control or an improper reliance on the breach of peace power)?

1.6 Did the Defendants fail to have sufficient policies and practices in place for the protection of demonstrators' *Charter* rights, or otherwise fail to take reasonable steps to ensure the protection of the class members' *Charter* rights?

Abuse of Public Office

2.1 Did commanding, supervising, or senior officers under the authority of the Defendants know that the decisions or orders referred to in (a) and (b) below were unlawful, or were reckless as to their unlawfulness (if said orders or decisions were in fact made)?

(a) The decisions and orders referred to in paragraphs 1.2, 1.3 and 1.5 above; and

(b) The mass arrest/detention orders made in relation to the location-based subclasses?

2.2 Did commanding, supervising, or senior officers under the authority of the Defendants know that the decisions or orders referred to in paragraphs 2.1 (a) and (b) above would result in harm to the class members, or were reckless or willfully blind as to the possibility that harm would occur (if said orders or decisions were in fact made)?

The Mass-Detention and Mass-Arrest Subclasses
(i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale, Queen's Park, and Gymnasium subclasses)

3. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members and/or (b) arbitrary detention or imprisonment contrary to section 9 of the *Charter*?

4. If the mass detention or arrest of a subclass was unlawful, did the Defendants' conduct therefore also amount to (a) assault and/or battery; (b) trespass; and/or (c) a breach of section 8 of the *Charter* (i.e. unreasonable search and seizure)?

5. Did the Defendants infringe the respective subclass members' rights under section 2 of the *Charter* (e.g. freedoms of expression, peaceful assembly, and/or association)?

6. Did the Defendants infringe the respective subclass members' rights under section 7 of the *Charter* (i.e. right to life, liberty, and security of the person)?

7. Did the Defendants infringe the respective subclass members' rights under section 10 of the *Charter* (i.e. the right upon arrest or detention to be informed promptly of the reasons therefor, to retain and instruct counsel without delay, and to be informed of that right)?

8. Did the Defendants discriminate against the Gymnasium Subclass members under Ontario's *Human Rights Code* by targeting them for arrest or negative treatment based on prohibited grounds, including the perception that most or all of the subclass members were Québécois?

The Overlapping Detention Centre Subclass

9. Did the conditions or treatment of subclass members within the Eastern Avenue Detention Centre amount to cruel and unusual treatment or punishment under section 12 of the *Charter*?

10. Did the Defendants infringe the respective subclass members' rights under section 10(b) of the *Charter* (i.e. the right to retain and instruct counsel without delay and to be informed of that right)?

11. Did the Defendants detain the subclass members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to section 9 of the *Charter*?

Charter Section 1

12. Were any infringements of the *Charter* justified and allowable under section 1?

Remedies and Damages

13. If the Defendants breached the class members' common law or *Charter* rights, can the Court make an aggregate assessment of damages as part of the common issues trial?

14. Were the Defendants guilty of conduct that justifies an award of punitive damages?

15. Are declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit warranted?

16. Are orders requiring the Defendants to expunge certain records warranted?

SCHEDULE "C"

The Proposed Class Before the Divisional Court

The proposed class members for this action include those individuals who were:

(a) Arrested or subjected to mass detention in a police cordon in the vicinity of the intersection of Queen Street West and Spadina Avenue on the afternoon of June 27, 2010, and eventually released without charge (the "Queen and Spadina Subclass");

(b) Arrested or subjected to mass detention in a police cordon in the vicinity of the Hotel Novotel Toronto Centre on the Esplanade on the evening of June 26, 2010, and eventually released without charge (the "Esplanade Subclass");

(c) Arrested or subjected to mass detention in a police cordon in the vicinity of the Eastern Avenue Detention Centre on the morning of June 27, 2010, and eventually released without charge (the "Eastern Avenue Subclass");

(d) Arrested or subjected to mass detention in a police cordon in the vicinity of the intersection of Queen Street West and Noble Street on June 27, 2010, and eventually released without charge (the "Parkdale Subclass");

(e) Arrested at the University of Toronto Graduate Students' Union Gymnasium on the morning of June 27, 2010 (the "Gymnasium Subclass"); and

(f) Arrested and imprisoned in the Eastern Avenue Detention Centre beginning on June 26 or 27, 2010 (the "Detention Centre Subclass").

SCHEDULE "D"

The Proposed Commons Issues Before the Divisional Court

The five location-based mass-detention and mass-arrest subclasses:
(i.e. Queen and Spadina, Esplanade, Eastern Avenue, Parkdale and Gymnasium subclasses)

1. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members and/or (b) arbitrary detention or imprisonment contrary to section 9 of the Charter?

2. Did the Defendant discriminate against the Gymnasium Subclass members under Ontario's Human Rights Code by targeting them for arrest or negative treatment based on prohibited grounds, including the perception that most or all of the subclass members were Québécois?

Detention Centre Subclass:

3. Did the conditions or treatment of subclass members within the Eastern Avenue Detention Centre amount to cruel and unusual treatment or punishment under section 12 of the Charter?

4. Did the Defendant owe a duty of care to the Detention Centre Subclass members, and if yes, did the conditions and/or treatment of detainees in the Eastern Avenue Detention Centre amount to a breach of that duty of care?

5. Did the Defendant infringe the respective subclass members' rights under section 10(b) of the Charter (i.e. the right to retain and instruct counsel without delay and to be informed of that right)?

6. Did the Defendant detain the subclass members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to section 9 of the Charter?

Charter Section 1:

7. Were any infringements of the Charter justified and allowable under section 1?

Remedies and damages:

8. If the Defendant breached the class members' common law or Charter rights, can the Court make an aggregate assessment of damages as part of the common issues trial?

9. Was the Defendant guilty of conduct that justifies an award of punitive damages?

10. Are declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit warranted?

11. Are orders requiring the Defendant to expunge certain records warranted?

SCHEDULE "E"

The Certified Common Issues

For the location-based subclasses:

1. Did each mass detention and/or arrest (or the prolonged duration thereof) constitute (a) false imprisonment of the respective subclass members at common law and/or (b) arbitrary detention or imprisonment contrary to s. 9 of the Charter including a determination whether the mass detention and/or arrests are justified under s. 1?

2. If the Defendant breached the class members' common law or Charter rights, can the Court make an aggregate assessment of damages as part of the common issues trial?

3. Was the Defendant guilty of conduct that justifies an award of punitive damages?

4. Are declarations regarding the lawfulness of certain police actions and/or tactics during the G20 Summit warranted?

5. Are orders requiring the Defendant to expunge stipulated records warranted?

For the Detention Centre class:

1. Did the conditions or treatment of the class members within the Eastern Avenue Detention Centre amount to cruel and unusual treatment or punishment under s. 12 of the *Charter*?

2. Did the Defendant owe a duty of care to the Detention Centre class members, and if yes, did the conditions and/or treatment of detainees in the Eastern Avenue Detention Centre amount to a breach of that duty of care?

3. Did the Defendant infringe the respective class members' rights under s. 10(b) of the *Charter* (i.e. the right to retain and instruct counsel without delay and to be informed of that right)?

4. Did the Defendant detain the class members for an excessive and/or unnecessarily long time, such that their ongoing detention constituted false imprisonment or arbitrary detention contrary to s. 9 of the *Charter*?

5. If the Defendant breached the class members' common law or *Charter* rights, can the Court make an aggregate assessment of damages as part of the common issues trial?

6. Was the Defendant guilty of conduct that justifies an award of punitive damages?